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Supreme Court of the United States

OCTOBER TERM, 1930

No. 600

ATLANTIC COAST LINE RAILROAD COMPANY.
Petitioner,

—vs—

J. L. POWE, Administrator of George A. Marshall, Deceased, - - - - - *Respondent.*

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

LOGAN & GRACE,
Attorneys for Respondent.

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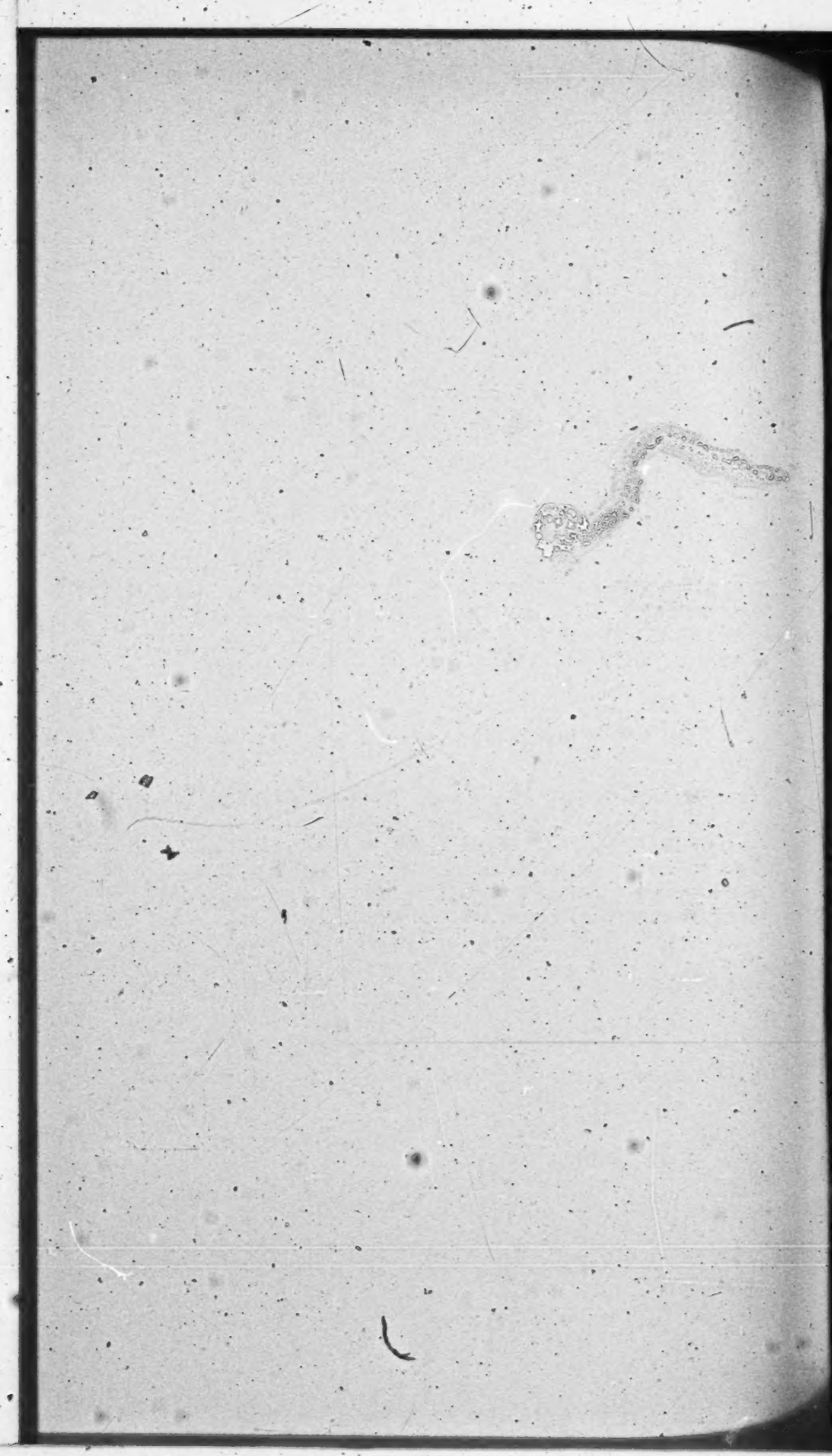

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STATEMENT OF FACTS

The statement of facts as summarized in the brief of Lionel K. Legge, of Counsel for Respondent herein is adopted by us, and makes it unnecessary to make any further statements.

ARGUMENT

At the first trial of this case, the plaintiff, in order to show by circumstantial evidence the cause and manner of death, relied on the testimony of the coroner who was called to the scene of the accident immediately afterwards, and of the train engineer who got down from his engine upon report that the man was missing and walked back to the place where the dead man lay.

SUFFICIENCY OF EVIDENCE

An examination of the record led this court to hold, under the Chicago M. & St. P. R. Co. vs Coogan 271 U. S. 472, that this testimony was not enough.

The coroner's testimony was important in certain of its features, and although the coroner was dead at the second trial, the record of his testimony under our rules was again put in evidence. The testimony of the engineer, however, was not again put in evidence. As the engineer could "not remember" at the first trial anything more than he testified, the lapse of time would not have helped his memory. Besides, he was not an eye witness, was a hostile witness and being in the employ of the Company would presumably remember nothing more than he reluctantly remembered at the first trial. Te brief of the petitioner would make it appear that because we did not choose to put up the *same* evidence as we put up at the first trial, which this court held insufficient, we therefore did not put up *as much* evidence, notwithstanding we put up *different* evidence and evidence of a quality which we knew was necessary to meet the doctrine of the Coogan case and the demands of this Court.

The petitioner, throughout its brief, both before our State Supreme Court and before this court, suggests practically that in some respects we had no right to put up this new evidence. The courts have found that we had a right to do so. We submit that the very earnestness which petitioner shows in this particular indicates that we did put up, from

its standpoint, *damaging* evidence. It is true that this new evidence to which it objects was compassed within a very narrow scope. It was only a few words. But we submit it was of the very essence of evidence and was all the more valuable because it came not from our lips but from the lips of the petitioner itself. It will be recalled that there is nothing in the nature of direct evidence in the record of the first trial as to exactly how decedent came to his death. Circumstances, yes; circumstances which spoke with more emphasis and with more clarity in a local court house before a listening jury than in the cold printed word of the record which came up to this court and which this court held, under the Coogan case, were not of the character of such circumstantial evidence as would make out a case.

Very well; at the second trial, we made up our minds that the petitioner (defendant) would not again have the excuse that "the evidence is wholly insufficient to show the cause of decedent's death, and leaves that question entirely to conjecture." The petitioner had gotten away with this contention on the record of the first trial. It rang through its brief before this court. It was even contended in oral argument here that for all this court knew, the decedent might have suddenly dropped dead at the semaphore post. Who could say otherwise? Nothing he contended could be taken from the fact that he was dead or that he was dead near the semaphore post, and that he had been a young man, just a few minutes before, apparently in the prime of health. It was more "speculation", although he was dead, that his death had any relation to the time, place and circumstances.

Unfortunately, the coroner had failed to have an autopsy performed. We maintained that this was because the cause of his death was so obvious that no autopsy was necessary. But that also was only "speculation". Passing over the fact that if the decedent had just dropped dead while out in the discharge of his duty at 3.30 in the morning, the Railroad Company would not have stopped all of its operations until the coroner came and would simply have

brought the body in with the report that he had dropped dead; passing over the testimony of the engineer at the first trial out of which the jury could have drawn no other reasonable inference than that the engineer stopped his train, went back and found the dead body by the semaphore post, "with the dew brushed off", which connected the two things in his mind; and determined to adhere strictly to the meaning of the decision of this court in this case that there was a missing link, we put in *two* species of new evidence at the second trial which the petitioner seems to ignore in its probative value.

First: We went out to the grave yard where decedent was buried, dup up his body, safeguarding the transaction with every precaution as to identity, and had the physician who attended him in life examine his remains, dissect his skull from his body, guard it carefully, bring it into court with his own hands and show it to the jury, accompanied by his positive testimony that the man had come to his death by a most terrific and violent blow on the back of the head, which literally shattered his skull into fragments, as exhibited in court.

Second: Remembering (of which this court will take judicial notice, perhaps) that under the rules of the Interstate Commerce Commission, carriers under the Employers' Liability Act are required to hold immediate inquiry after such accidents, but without having the power to force the production of the report on this inquiry, we nevertheless reasoned that the defendant itself must have been governed by the inquiry and must perhaps have made up its answer to the complaint in this case based upon it. This was a sworn answer. Under the weight of authorities, the facts set up in pleadings will not be taken as admissions in the form of evidence, unless as such, they are proved as any other fact would be proved in the trial of the case. So we carefully introduced at the second trial under our right to do so by the decisions of our Supreme Court, of this Supreme Court and of the great majority of the Supreme

Courts of the land, the exact fact which the defendant swore to in his answer as being the instrument causing the death of the plaintiff to wit: the semaphore. In other words, in response to the allegations of our complaint which were (T. R. f. 11):

> "While the said George A. Marshall was mounting the ladder of one of the cars attached or while examining the defective car as aforesaid, the defects in which were due to the negligenc of the defendant herein, thereby necessitating that said decedent examine the same, and while thus engaged in the duties incident to his employment, he was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death soon thereafter."

The defendant in paragraph Seven of its answer, swore:

> "Further answering said complaint . . . . . this defendant alleges that the injuries and death of the deceased . . . . . (d) in leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore".

The defendant in its answer had not denied all the allegations of the complaint, but only such as were not "hereinabove or hereinafter specifically admitted."

It is true that the fact of the manner of the decedent's death in paragraph Seventh which we proved as a part of the defendant's answer, was set up as a fact by the defendant for the purpose of proving "contributory negligence". But the fact was not set up "hypothetically". It was set up absolutely as a fact. It is true, also, that a defendant may, under our code pleading, set up as many inconsistent defenses as he will. But when in the course of an answer in response to a complaint which has not been met with an "unqalified denial", the defendant for any purpose sets up a fact of which he hopes to take the benefit, he is bound by the fact and he may not afterwards deny it for his own

benefit. He cannot play fast and loose with facts. He cannot withdraw facts at his pleasure. After we pinned him down in this case by proving this fact, he squirmed and tried to withdraw his plea of contributory negligence, which he could do, of course, and which the trial judge allowed him to do. But he could not withdraw the fact that had been proved. Moreover, the potency of this fact lies in that it arose out of an investigation by the defendant after the accident when it was in possession and had dominion over everyhing that could throw any light upon the case. It came to the conclusion that a miracle had not happened; that this vigorous young man had not suddenly dropped dead by the semaphore post, but with the semaphore post in its possession, with the box car in its possession, with the blood stains on the semaphore post in its possession, with the dew rubbed off the semaphore post in its possession, with the blood on the ground by the semaphore post in its posession, with the dead body lying in the midst of all this in its possession, with every motive on the part of itself and its witness to exculpate themselves and to say, if possible, that the death was simply a mystery, defendant solemnly swore that there was no mystery about it at all, that he was killed by the semaphore and in order to exculpate itself it put up the plea of contributory negligence, which it withdrew only at the trial because it thought by doing so, it might deprive truth of the value of a fact.

So that this case comes back before this court not under the Coogan case, not with "circumstances presumed" from which further presumptions are inferred, and therefore in the realm of speculation as to the cause of death, but with the shattered skull of the decedent before the jury, the testimony of the doctor that the condition of the skull could only have been caused by coming into contact with something such as the semaphore post before the jury; with the testimony of the new witness, Tyner, that the blood was on the semaphore post, before the jury; and with the sworn admission, proved this time as a substantive fact in the case by the defendant that such was how the decedent came to his death, before the jury.

Although the petitioner makes three points in his argument in support of his petition for a writ of certiorari, these points really divide themselves into only two principles. We have disposed of the principle of evidence involved in the Coogan case. The other principle involved is that of Assumption of Risk.

ASSUMPTION OF RISK

On the question of assumption of risk, this case was sent back on the Berkshire and the Leitch cases. We realized, of course, that unless there was a wholly different principle involved in this case, though it was not clearly brought out at the first trial, distinguishing this case from the Berkshire and the Leitch cases, we would be out of court on the question of Assumption of Risk.

We had causually and incidentally proved at the first trial that the semaphore post in this case, at which the decedent was killed, was only 5 ft. 4 inches from the outer edge of the rail. An examination of the records at the second trial will prove: that the decedent was a switchman who had worked twice for the Atlantic Coast Line, once at Florence, some years before, and that he had been recently before his death re-employed to work in the Charleston yard, where he had worked for three months and where, presumably, he was familiar with the ordinary risks of the yard, the obstructions that were there, or with the extraordinary risks, if they were obvious, etc. But he was not killed in the Charleston yard with which he was familiar. In an emergency, at 3.30 o'clock in the morning when it was dark and foggy, he was suddenly called out to do extra duty to wit: to help clear up a wreck on the main line five miles from Charleston. While out there, a defect arose on the brake of one of the cars. He knew nothing about semaphore posts, and he particularly knew nothing about the fact that, contrary to all other cases of the location of semaphore posts, the defendant Company had placed the fatal semaphore post, 3911, unusually close to the track. All he knew was that in the darkness of this night, his duty

called him to hang down from the ladder to watch the defective brake lest there might be another accident. He would have been negligent if he had not done so. The farthest thing from his mind, and of which he had no previous knowledge was that, for its own convenience, his Master had in one case placed a semaphore post where he would be killed by it unless he knew, or ought to have known, that it was there. The jury heard the testimony and heard the judge's charge, to which no exception was taken on the question of assumption of risk. It was for the jury to say whether this poor man had met his death, not through his fault, but through the fault of the defendant Company. In the petitioner's brief, he seems to suppose that we are so silly as to maintain that the principle involved in the Berkshire and Leitch cases was that only mail cranes could be put as the mail cranes were placed in these cases. On the contrary, we know that the principle in those cases was that because the railroad company was required to have these mail cranes where they were placed, and that they were always placed there, train crews were supposed to know that and therefore assumed the risk that they were there and must look out for them.

Fully understanding the Southern Pacific C. v Berkshire, 254 U. S. 416, 41 S. C. 162, 65 L. Ed. 335 and Ches. & O. R. C. v Leitch, 276 U. S. 472, we respectfully submit that the case at bar falls squarely within the case of Central of Georgia Ry. Co. vs Davis, 7 Fed. (2nd) 269. In that case, this court denied a writ of certiorari, 269 U. S., p 578, 70 Law Ed. p 422. The denial of the writ is tantamount, we submit, to sustaining the doctrine of that case which was concurred in by the three judges of the Fifth Circuit. In that case, the Berkshire case was fully considered and the court said, (p 270):

> "The case is quite different from Southern Pacific Co. v Berkshire, 254 U. S. 416, 41 S. C., 162, 65 L. Ed 335. In that case it was held that an experienced locomotive engineer who had operated many times over a railroad where mail cranes were uniformly set up close to the track was to be presumed to have known the danger of being struck when leaning from his cab

window while passing a mail crane. It is to be inferred that, in reaching the conclusion in that case, that the engineer 'perfectly well knew of the existence of the crane where it stood', the court was influenced by the considerations that he was charged with the duty of keeping a lookout ahead, and that there was uniformity in the location of mail cranes with reference to the track traversed by the engineer. Pertinent authorities support the conclusion that in the instant case, it was not a necessary inference from undisputed evidence that the deceased, while performing his duties as a flagman, must have become aware of the location of the mail crane platform with reference to the track and must have realized the danger therefrom". (citing cases).

We have examined the briefs in the Berkshire case of which we have copies. From the agreed statement of facts, page 5 of the petitioner's brief, Case No. 106 in the Supreme Court of the United States, October term, 1919, we quote:

> "The undisputed evidence in the case showed that Linder had made ninety-nine trips over defendant Company's line from El Paso to Deming, New Mexico, by the station of Carney, New Mexico, where the mail crane is located, from July 1, 1914, to December 21, 1914, and had made one hundred and fifty-four trips over said company's line past the point of the accident, during the six months immediately preceding his accident on July 3, 1916, and during all of this time the said mail crane was in the came position and similiarly located as it was at the time of the accident to said deceased Linder. . . . . "

And again, on page 6:

> "All cranes are at a standard distance from the side of the car, that is, they are all the same distance exactly. . . . .could be seen half a mile down the track by the engineer when traveling in the direction in which

deceased was traveling at the time of the accident to him. . . .

"It was pleaded by plaintiff and urged strongly that the defendant had been negligent in placing the mail crane too near the tracks, but it was positively shown without contradiction that this mail crane at Carney was similarly situated to all the other cranes on defendant's lines".

In the Davis case, supra, the facts were quite different and practically identical with the facts in this case. We quote from that case:

"While Davis, after the train got in motion again, was standing on the bottom step of a passenger coach, facing towards the rear of the train, stooping or leaning and looking under a coach, to discover the cause of a noise that was heard, having his head several inches out from the side of the coach, he was struck by the mail crane platform which was on the same side of the train as that on which passengers got off and on. That platform was North of the crossing. It was built around the bottom of a mail crane, and its purpose was to provide a place for a person to stand on while hanging a mail sack on the arm of a crane. It is about 4 feet high and was 3 or 4 inches from the outside of a passing coach. *Other mail cranes along the line Davis served on were iron cranes, with ladders, and did not have a platform around them.*"

On the direct point of the assumption of risk, the court said:

"The above-mentioned ruling is complained of on the ground that under the undisputed evidence the deceased assumed the risk due to the presence of the mail crane platform at the place above indicated. The evidence warranted a finding that the employer was chargeable with negligence in permitting that object

to be unnecessarily near the track. In order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it. Gila Valley Ry. Co. v Hall, 232 U. S. 94, 102, 34 S. Ct. 229, 58 L. Ed. 521. We are of the opinion that under the circumstances disclosed by a phase of the evidence it was properly a question for the determination of the jury whether the deceased did or did not know of the location of the mail crane platform and of the danger therefrom to trainmen on passenger trains. The evidence as to the circumstances under which the deceased daily passed that object was not such that it required the inference that he knew of its location and realized the danger therefrom to one who in passing on a train has the whole or part of his body out from the side of a car. In passing on the question whether the deceased did or did not know of and appreciate the danger, the jury might properly be influenced by the considerations that the mail crane's platform in question was the only structure of its kind on the line on which deceased served; that at the times when he had an opportunity to observe it, he probably was engaged in assisting passengers off and on the train and in performing other duties of a flagman, incident to the stopping and starting of the train, and, so far as appears, was not charged with the duty of looking out ahead for obstructions near the track; and that, if he casually saw the platform quite a distance from him, he, without being negligent, might have failed to realize how far it was from a passing car. The case is quite different from Southern Pacific Co. v Berkshire".

Our case is even stronger than the Davis case. Davis "had been a flagman on the same train for several months and had passed Arkwright in the day time each day

during that time". The decedent, Marshall, in the instant case had never passed the place where he was killed. It was not his duty ordinarily to be there but five miles away doing yard work. It was not his duty to look out for obstructions on the side of the track. If he had looked out at 3.30 o'clock on a dark morning, he could not have seen this obstruction. He had a right to presume it was not there, as no other semaphore was placed so close to the track. The fact that he did not see it cannot be better proved than by his shattered skull, for surely, if he had seen it, he could have readily moved his head and saved his life. These were the points that were emphasized at the second trial and which, in the atmosphere of the case, must have been so strong and so different in their import than the facts of the first trial that the defendant made no motion for non-suit, which he did at the first trial.

Petitioner makes an effort to hold the Supreme Court of our State guilty of having mixed the facts of the first trial with the facts of the second trial. Of course the second trial, at the trial court, was not tried upon the facts of the first trial. Those facts were not presented to the jury in anyway whatsoever. Moreover, the trial judge charged the jury (T. R. f. 254) .....

> "And right at the beginning, I want to say to you that what was done in the other case has nothing to do with this case. You and I are trying this case just as if it was coming into court for the first time and we must do it that way. What is the case that has been made before us as presented by the plaintiff? That is what we must act on and nothing else".

It is a well settled ancient principle of law that if a decision is sound, the reasoning of the court in coming to its conclusion is immaterial. When the case went up before the State Supreme Court for the second time, a

mass of records had been accumulated. The new record, however, of the second trial, and the new briefs, were all that were before the Supreme Court and it was upon these that the case was argued and the court came to its conclusion offhand, by four to one. In writing the opinion of the court, Associate Justice Graydon incorporated some of the facts that had been adduced at the first trial. It is perfectly clear, however, that the merits do not rest upon these facts, but on the salient facts of the second trial. He knew and the three other members of the court who concurred with him knew what the Supreme Court of the United States had previously ordered in this case, and precisely upon what points of law the new trial depended. It is a case which has become more or less a cause celebre in our State. Marshall was killed on January 6, 1923. The case did not come on for a hearing until many preliminary motions were disposed of before the resident circuit judge. These motions were heard on June 19, 1924, and orders were filed by Judge R. W. Memminger on June 29, 1925. He is now dead. When Marshall was killed, he left two children in the flesh and one child still in its mother's womb and that child is now nearly eight years old. The coroner who examined his dead body is dead. Judge DeVore, who was first trial judge, is now dead. Some of the witnesses and several of the jurors at the first trial are dead. The very writer of the opinion now before the Supreme Court, Associate Justice Graydon, was sitting when the case was heard this time in place of Chief Justice Watts, who was then ill, who presided at the hearing before our Supreme Court the first time. Chief Justice Watts is now dead. The venerable Chief Justice of this court, the lamented Taft and one other member of this court, before whom we appeared last, have since themselves appeared before the Great Judge. The widow and her three children have waited eight years during the law's delays, living on charity, and the bounty of her father, who was the plaintiff in the first case, the administrator of the deceased and who himself is now

dead. And now this case comes back before this court with a new administrator, still holding out in this temple the open palm in which we hope may drop at last the word of justice for this poor and weary widow and her children who have waited so long. Our State Supreme Court has again, by a four to one decision, left the matter in the hands of this court. But again, the great dissenter of our State Supreme Court in such cases, Associate Justice Cothran, has chosen to withhold his approval, and to take the side of the defendant railroad company. It would seem that if the petitioner in this case had regarded the error of the writer of the opinion in this case, based as it was upon some confusion about the record, as prejudicial to it, it would have asked for a re-hearing; because certainly if our Supreme Court had thought that this error was not a harmless error, but affected the merits of the case, it would have granted the rehearing and reversed the lower court carefully on the record. It is so obvious a mistake that the dissenting justice, if he had thought it important, would have called the attention of his four brethren to the fact that while he dissented from their opinion he knew they did not wish to base their opinion upon a manifest error of the record. They would, of course, have been governed accaccordingly. Certainly the four members of our Supreme Court would not perversely and contumaciously refuse to be governed by the record. For the petitioner to have sat silent and the dissenting justice to have written his opinion without asking his brethren to correct this error ought to be a clear indication to this court that the error was not regarded as one that would not have been at once corrected without affecting the decision in the case. It was altogether unnecessary, after these eight years, and after the story of the deaths which we have recited, for this widow and her orphan children to be dragged again up to the Supreme Court of the Untied States if in truth the error was correctible below. With all due respects, it seems like trifling with the majesty of justice and with the dignity of our State Supreme Court, as well as the

august Supreme Court of the United States to have prolonged the time and multiplied the expense of this cause by what could well be denominated a "trick of silence."

Therefore, there appearing upon the record no prejudical error, we pray that this petition for the writ be dismissed.

Respectfully submitted,

W. Turner Logan

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